IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 22, 2008

STATE OF TENNESSEE v. WILLIAM C. "BUNKY" OSBORNE, JR.

Appeal from the Circuit Court for Lawrence County
No. 25090 Stella Hargrove, Judge

No. M2007-02005-CCA-R3-CD - Filed November 4, 2008

The Defendant, William C. "Bunky" Osborne, Jr., appeals from the order of Lawrence County Circuit Court revoking his probation. In March 2006, the Defendant pled guilty to attempted second degree murder, Class D felony theft, and Class C felony vandalism and received an effective fifteen-year sentence. He was placed on intensive probation. Following the Defendant testing positive for cocaine, the trial court revoked the Defendant's probationary sentence and ordered that his original fifteen-year sentence to the Department of Correction be reinstated. On appeal, the Defendant argues (1) that the evidence does not support full revocation of his probation, (2) that it was improper for a different judge from the original sentencing judge to preside over the revocation hearing, and (3) that he was denied equal protection under the law because, unlike other probationers, he was not offered alternative methods to deal with his drug problem. After a review of the record, we conclude that the trial court did not abuse its discretion by revoking the Defendant's probation and that the Defendant's remaining issues are waived. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and D. KELLY THOMAS, JR., JJ., joined.

Sharon D. Aizer, Assistant Public Defender, Columbia, Tennessee, for the appellant, William C. "Bunky" Osborne, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; and Mike Bottoms, District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

In February 2005, the Defendant drove a stolen pickup truck into the rear of his wife's car, pushing the car into the interior of a rental home and pinning her against a wall. Thereafter, a

Lawrence County grand jury charged the Defendant with attempted first degree murder, Class D felony theft, and Class C felony vandalism.

On March 8, 2006, the Defendant pled guilty to attempted second degree murder, theft of property valued between $1,000 and less than $10,000, and vandalism valued between $10,000 and less than $60,000.[1] See Tenn. Code Ann. §§ 39-12-101 (criminal attempt), -13-210 (second degree murder), -14-103 (theft), -14-105 (grading of theft), -14-408 (vandalism). Pursuant to the terms of the plea agreement, he received consecutive terms of eight years, four years, and three years respectively, resulting in a total effective sentence of fifteen years. The sentence was suspended, and the Defendant was placed on intensive probation.

A probation violation warrant was issued on June 12, 2007. According to the warrant, the Defendant's probation officer sought to revoke the Defendant's probation because he tested positive for cocaine on May 16, 2007, and was in possession of cocaine on the same date.

On August 7, 2007, a probation revocation hearing was held. Angela Harlan, the Defendant's probation officer, testified that she was assigned to supervise the Defendant. Harlan administered the Defendant a random drug test on May 16, 2007, and cocaine was found in the Defendant's system. When asked to explain the positive cocaine result, the Defendant assured Ms. Harlan that he had not used cocaine.

A second drug screen of the Defendant was taken thirteen days later on May 29, 2007. The test again revealed evidence of cocaine use. The Defendant advised Ms. Harlan that a relative was cooking drugs inside the home, and "he possibly could have eaten out of a bowl that might have had the drugs in it or drank something that might have been used earlier with the drug consistency."

The Defendant later wrote Ms. Harlan letters from jail, wherein he admitting to using cocaine on these occasions. Ms. Harlan also stated that, at some later date, the Defendant personally admitted to her that he had used cocaine and apologized to her for not being truthful at the time of the drug tests. Ms. Harlan also relayed that restitution to the victim was a part of the Defendant's plea agreement and that the "majority of the time, he . . . actually paid ahead."

On cross-examination, Ms. Harlan confirmed that this was the first violation warrant filed against the Defendant. When asked about an "in-house" drug program for other probationers who test positive for drugs, she replied that, depending on which substance a probationer was using, her office sometimes utilizes a "progressive intervention"—usually, the probationer meets with two probation officers, and they discuss the situation and try to come up with a solution, rather than filing a violation warrant. Ms. Harlan also discussed "The Freedom From Self" program. She relayed that it was not a service of the probation office but was provided by the community, she also relayed that the program was offered to probationers but was not required. Ms. Harlan affirmed that neither of these programs were offered to the Defendant.

[1] The transcript of the guilty plea hearing is not included in the record on appeal.

At the conclusion of the proof and argument, the trial court revoked the Defendant's probation, reinstated his original fifteen-year sentence, and remanded him to the Department of Correction, concluding as follows:

> There are two things that stand out in this [c]ourt's mind . . . . And these are his own words, "I never refused any tests, because I never thought it would still be in my system." So he obviously thought it was out before he used again. He also says, along the line of, maybe, possibly treatment. He says, "Angela, you know, I don't have a problem with drugs or alcohol. It was just a bad call on my part," and he goes on to blame some woman, I think.
>
> So it's never, never, never the probationer's fault. . . .
>
> And then, to me this is thumbing your nose at the system when he says "I thought it would be out of my system." Sure he did. And here he test positive again, for cocaine. And doesn't come forward with any kind of real admission until after that lab report comes down and then some 19 to 20 days later here come the jail house letters. . . .
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> Now, maybe he did follow most of the rules of probation. But you know, . . . you can't do that. You can't just follow some. Pick some and ignore the others.

It is from the order of revocation that the Defendant now appeals.

ANALYSIS

The Defendant contends that the evidence adduced at the hearing did not support full revocation of his sentence. Specifically, the Defendant states as follows:

> There is no evidence that any less restrictive measures were applied to [the Defendant's] drug abuse problem, though the statute calls for less restrictive measures to be used "frequently or recently" before incarcerating a defendant. The probation department had less restrictive options available to address this situation, but chose not to offer those options to [the Defendant]. . . .
>
> The evidence does, however, portray a model probationer, who, after some fourteen (14) months of probation, succumbed and used drugs. Rather than take notice of [the Defendant's] demonstrated rehabilitative potential, the trial court, like a spider sitting on a web, pounced on [the Defendant's] one mistake and trundled him off to the penitentiary.

We note that the Defendant does not challenge the grounds supporting revocation.

A trial judge is vested with the discretionary authority to revoke probation if a preponderance of the evidence establishes that a defendant violated the conditions of his or her probation. See Tenn. Code Ann. §§ 40-35-310, -311(e); State v. Shaffer, 45 S.W.3d 553, 554 (Tenn. 2001). "The proof of a probation violation need not be established beyond a reasonable doubt, but it is sufficient if it allows the trial judge to make a conscientious and intelligent judgment." State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991).

When a probation revocation is challenged, the appellate courts have a limited scope of review. This Court will not overturn a trial court's revocation of a defendant's probation absent an abuse of discretion. See Shaffer, 45 S.W.3d at 554. For an appellate court to be warranted in finding that a trial judge abused his or her discretion by revoking probation, "there must be no substantial evidence to support the conclusion of the trial court that a violation of the conditions of probation has occurred." Id.

Based upon our review of the record, we conclude that there is substantial evidence to support the conclusion of the trial court that a violation of the conditions of probation occurred. Regardless of the fact that the Defendant complied with other conditions of his probation, it nonetheless remains that the Defendant breached his agreement by failing to remain drug-free. The Defendant tested positive for cocaine while on intensive probation. Moreover, he showed a lack of candor with his probation officer when questioned about his cocaine use. The trial court was statutorily authorized to reinstate the Defendant's original fifteen-year sentence. See Tenn. Code Ann. §§ 40-35-310, -311(e), -36-106(e)(4). Accordingly, we conclude that the trial court neither erred nor abused its discretion in revoking the Defendant's probation. This issue is without merit.

Additionally, on appeal and for the very first time, the Defendant argues that the trial judge who revoked his probation was different from the judge who originally granted him probation, a violation of Tennessee Code Annotated section 40-35-311(b),[2] and that his equal protection rights were violated when his probation officer petitioned for revocation of his sentence instead of offering him an "in-house" program, available to other probationers, to treat his drug problem.

The record reflects that the Defendant failed to request a hearing with the original judge or object to the different trial judge presiding over the revocation hearing. Moreover, while the Defendant inquired about "in-house" drug programs, the Defendant did not raise an equal protection challenge to the revocation of his sentence in the trial court. These issues are raised for the first time on appeal.

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[2] Section 40-35-311(b) provides for the following revocation procedure:

> Whenever any person is arrested for the violation of probation and suspension of sentence, the trial judge granting the probation and suspension of sentence, the trial judge's successor, or any judge of equal jurisdiction who is requested by the granting trial judge to do so shall, at the earliest practicable time, inquire into the charges and determine whether or not a violation has occurred, and at the inquiry, the defendant must be present and is entitled to be represented by counsel and has the right to introduce testimony in the defendant's behalf.

Typically, in these circumstances, our consideration of these issues on appeal is waived. See Tenn. R. App. P. 36(a) (providing that relief is not required for a party who failed to take reasonably available action to prevent or nullify an error). It has long been established that an appellate court will not consider an issue raised for the first time in the appellate court. Lawrence v. Stanford, 655 S.W.2d 927, 929 (Tenn. 1983); State v. Alvarado, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996). Review may be permitted only if plain error exists. See Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(b); State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000). As previously noted, there is substantial evidence to support the conclusion that a probation violation occurred, and the trial court was statutorily authorized to reinstate the Defendant's original sentence. Thus, because consideration of these issues is not necessary to do substantial justice, we decline to review these issues under the plain error doctrine. See State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994). Consequently, these issues are waived on appeal.

CONCLUSION

Based upon the foregoing, the judgment of the Lawrence County Circuit Court revoking the Defendant's probation and ordering reinstatement of his fifteen-year sentence in the Department of Correction is affirmed.

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DAVID H. WELLES, JUDGE